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IN THE

Supreme Court of the United States

OCTOBER TERM 1941

WALTER R. DOLLOFF, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

MAY IT PLEASE THE COURT:

The Petitioner, Walter R. Dolloff, prays that a writ of certiorari issue to review the judgment entered on the 8th day of July, 1941 in the United States Circuit Court of Appeals, Eighth Circuit in the above entitled cause and for his petition for such writ states to this Honorable Court:

SUMMARY STATEMENT OF MATTER INVOLVED.

This cause involves a prosecution and conviction for a violation of the Liquor Enforcement Act of 1936. (27 U.S.C. 223). Specifically, the Petitioner was charged with "attempting" to transport intoxicating liquor out of the State of Missouri and into the State of Kansas.

The Liquor Enforcement Act of 1936 prohibits an attempt to transport intoxicating liquor into any state, which is otherwise qualified under the Act, if that state prohibits all sales for beverage purposes of intoxicating liquor containing more than 4 per cent of alcohol by volume. The State of Kansas does not prohibit all sales for beverage purposes of intoxicating liquor containing more than 4 per cent of alcohol by volume. Kansas prohibits all sales for beverage purposes of intoxicating liquor containing more than 3.2 per cent of alcohol by weight. A measurement of 3.2 per cent of alcohol by weight will always permit an intoxicating liquor to contain more than 4 per cent of alcohol by volume.

The difference between a measurement of 3.2 per cent of alcohol by weight and 4 per cent of alcohol by volume is not great. Nevertheless, it is a measurable amount. It varies with the specific gravity of the beverage. Beer, for example, containing 3.2 per cent of alcohol by weight will contain, depending upon the ingredients in the beer, 4.05 to 4.2 per cent of alcohol by volume.

The Liquor Enforcement Act of 1936 is not ambiguous in its provisions defining the States which are protected by it, i. e., those States which prohibit all sales for beverage purposes of intoxicating liquor containing more than 4 per cent of alcohol by volume.

However, if the Report of the House Committee on the Judiciary, 74th Congress, First Session, Report No. 1258, is consulted, it would appear that said committee and thus, possibly Congress, itself, at the time it passed the Liquor Enforcement Act of 1936 believed that the terms "3.2 per cent of alcohol by weight" and "4 per

cent of alcohol by volume" provided for identical measurements, to the same effect as would be the case in terms that provided for a measurement of one foot in one case and 12 inches in another.

The Circuit Court of Appeals, Eight Circuit, disregarded the difference between the Federal and the Kansas statutes and held that under the foregoing circumstances the Liquor Enforcement Act of 1936 applied to the State of Kansas. (R. 65-71.)

SUMMARY STATEMENT OF MATTER INVOLVED WITH CITATIONS TO THE RECORD.

Prosecution of the Petitioner was instituted and conviction had in the United States District Court for the Western District of Missouri. (R. 1-17.)

The following statement, taken from the opinion of the United States Circuit Court of Appeals, Eighth Circuit, clearly, briefly, succinctly and accurately summarizes the proceedings had in the trial court, the charge filed against the Petitioner, the defense made thereto by the Petitioner, the proceedings on appeal in said Circuit Court and the essential portions of the applicable statutes and therefore and because of the verity which inheres in said opinion, the Petitioner adopts said statement as an authentic statement of the matter involved. The statement contained in the Court's opinion is: (R. 65-67.)

> "Appellant was convicted on a charge of attempting to transport intoxicating liquor out of the State of Missouri and into the State of Kansas in violation of the Liquor Enforcement Act of 1936. We shall refer to appellant as defendant. The informa-

tion on which he was tried and convicted charged that,

> ' * * * the defendant, Walter R. Dolloff, being in possession of intoxicating liquor containing more than 4 per cent of alcohol by volume, to-wit, 152 gallons, more or less, of assorted whiskey, wine and gin, said intoxicating liquor being then and there transported in a motor car controlled and operated by the defendant, did unlawfully, knowingly and willfully attempt to transport said intoxicating liquor from and out of the State of Missouri into the State of Kansas, to Wichita, Kansas, in which said State of Kansas all sales (except for sacramental, scientific, medicinal and mechanical purposes) of intoxicating liquors containing more than 4 per cent of alcohol by volume, are prohibited * * * .'

"Defendant interposed a plea in bar on the ground that the Liquor Enforcement Act of 1936 did not apply to the State of Kansas for the reason that the State of Kansas did not prohibit all sales of intoxicating liquor containing more than 4 per cent of alcohol by volume. Defendant waived trial by jury and the court heard evidence offered in support of the issue raised by the plea in bar and denied the plea. After some proceedings not here material, defendant entered a plea of not guilty and again waived trial by jury and consented that the case be tried to the court. The evidence offered on the issue raised by the plea in bar was resubmitted. Defendant offered no evidence except that offered in support of his plea in bar, and at the close of the Government's evidence moved for judgment of acquittal on the ground that the evidence did not establish that the State of Kansas prohibited all sales of intoxicating liquor for beverage purposes containing more than 4 per cent of alcohol by

volume. This motion was overruled and the court found the defendant guilty and entered judgment sentencing him to prison.

"On this appeal defendant challenges the correctness of the court's order overruling his plea in bar, and likewise, its ruling in denying his motion for judgment of acquittal. But one question is presented and that is whether the Liquor Enforcement Act of 1936 (27 U.S.C.A. Sec 223) is applicable to the transportation of intoxicating liquor into the State of Kansas. This Act, so far as here applicable, reads as follows:

> '(a) Whoever shall import, bring, or transport any intoxicating liquor into any State in which all sales (except for scientific, sacramental, medicinal, or mechanical purposes) of intoxicating liquor containing more than 4 per centum, of alcohol by volume are prohibited, otherwise than in the course of continuous interstate transportation through such State, or attempt so to do, or assist in so doing shall: (1) If such liquor is not accompanied by such permit or permits, license or licenses therefor as are now or hereafter required by the laws of such State; or (2) if all importation, bringing, or transportation of intoxicating liquor into such State is prohibited by the laws thereof; be guilty of a misdemeanor and shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> '(b) In order to determine whether anyone importing, bringing, or transporting intoxicating liquor into any State, or anyone attempting so to do, or assisting in so doing, is acting in violation of the provisions of this chapter, the definition of intoxicating liquor contained in the laws of such State shall be applied, but only to the extent that sales of such intoxicating liquor (except for scientific,

sacramental, medicinal, and mechanical purposes) are prohibited in such State.'

"The laws of Kansas pertaining to the sale of intoxicating liquors read as follows:

"21-2101, G. S. 1935. 'It shall be unlawful for any person to directly or indirectly * * * sell * * * any spirituous, malt, vinous, fermented or other intoxicating liquors * * * .'

"21-2109, G. S. 1939 Supp. 'The term (spirituous), malt, vinous, fermented or other intoxicating liquors as used in Sections 21-2101 to 21-2108, inclusive, of the General Statutes of 1935, and all amendments thereto, are hereby defined to include all beverages which contain more than three and two-tenths per cent (3.2%) of alcohol by weight and all such beverages are hereby declared to be intoxicating liquors under the law of this state.'

"21-2109a. G. S. Supp. 'The words 'intoxicating liquors' or 'intoxicating liquor' wherever used in the General Statutes of 1935, and acts amendatory thereto, shall be construed to mean all such beverages referred to in Section 1 (21-2109) which contain more than three and two tenths per cent (3.2%) of alcohol by weight.'

"Section 6, Chapter 179, Laws of Kansas, [1935,] (1939) reads as follows:

'This act is intended to qualify Kansas for protection under the Twenty-first Amendment to the Constitution of the United States.' "

Evidence to show the relationship between a measurement of 4 per cent of alcohol by volume and 3.2 per cent of alcohol by weight was submitted to the trial

court upon the hearing upon the plea in Bar, (R. 30-39) and upon the case upon the merits (R. 49-Stip). In the proceedings upon the plea in bar the trial court made findings of facts and conclusions of law. Those findings of fact material here were as follows: (R. 41-42.)

"5"

"That an alcoholic mixture can be prepared which will contain 3.2% of alcohol by weight and 4.9% of alcohol by volume; that such mixture in the strict sense of the words would be a potable beverage but that there is no such mixture sold as a beverage, or in general use as a beverage."

"6"

"That the common alcoholic liquors in general use are whiskey, brandy, rum, gin and beer and wine; that whiskey, rum, gin and brandy are distilled liquors with an alcoholic content greatly in excess of either 3.2% by weight or 4% by volume; that said liquors are mixtures of alcohol and water with small traces of other solids; that were a beverage prepared containing the same proportion of solids as the said liquors, only 3.2% of alcohol by weight and the remainder of water, that said liquors would contain 4% of alcohol by volume; that beer and wine have a slightly higher percentage of solids than the liquors aforesaid; that beers and wines containing 3.2% of alcohol by weight will have slightly in excess of 4% of alcohol by volume and that said excess is usually so small as to be disregarded in ordinary commercial laboratory tests."

"7"

"That the generally accepted table for measuring the relative quantities of alcohol in alcoholic beverages by weight and by volume is the table pub-

lished by the United States Bureau of Standards, of which the court will take judicial notice and which was referred to in evidence, that (fol. 56) by said table an alcoholic beverage containing 3.2% of alcohol by weight will contain approximately 4% of alcohol by volume."

The Petitioner objected to certain findings of fact made by the trial court as follows: (R. 44-45.)

"Defendant objects and excepts to that portion of Finding of Fact number 6 in words and figures as follows:

> 'that said liquors are mixtures of alcohol and water with small traces of other solids; that were a beverage prepared containing the same proportion of solids as said liquors, only 3.2% of alcohol by weight and the remainder of water, that said liquors would contain 4% of alcohol by volume.'

for the reason that said Finding is contrary to the undisputed evidence and contrary to the Government's evidence and is not sustained by any evidence in the record.

"Defendant further objects and excepts to that portion of Finding of Fact 6 as follows:

> 'and that said excess is usually so small as to be disregarded in ordinary commercial laboratory tests.'

for the reason that said finding is contrary to the Government's evidence and contrary to the undisputed evidence and is not sustained by any evidence in the record.

"Defendant further excepts and objects to the Court's Finding of Fact 7 for the reason that the evidence does not sustain said Finding insomuch as said Finding finds that the tables published by the

> U. S. Bureau of Standards establish that an alcoholic beverage containing 3.2% of alcohol by weight will contain approximately 4% of alcohol by volume, is [it] specifically and definitely appearing by the undisputed evidence that said tables pertain only to mixtures of alcohol and water and even said tables do not establish that a mixture of alcohol and water containing 3.2% of alcohol by weight will not contain more than 4% of alcohol by volume. On the contrary, said tables establishing that in a mixture of alcohol and water containing 3.2% of alcohol by weight that such mixture will contain more than 4% of alcohol by volume."

The Petitioner's objections to the findings of fact made by the trial court were disallowed (R. 45).

There were only three witnesses who testified in the trial court in regard to the relationship between a measurement of 3.2 per cent of alcohol by weight and a measurement of 4 per cent of alcohol by volume. They were two witnesses offered by the Petitioner, Mr. Means and Mr. Hawthorne, and one witness offered by the Government, Mr. Dale. (R. 30-39.)

The witnesses were in accord on the proposition that a measurement of 3.2 per cent of alcohol by weight would always permit a beverage to contain more than 4 per cent of alcohol by volume.

The problem was first approached from a viewpoint of a mixture of alcohol and water alone.

Thus, Mr. Dale testified: (R. 37).

> "A solution of alcohol and water containing 3.2% of alcohol by weight would contain more than 4% of alcohol by volume."

Mr. Means testified (R. 33):

> "A solution of nothing but alcohol and water containing 3.2% of alcohol by weight would contain in the neighborhood of 4.01 or 4.02% of alcohol by volume."

Mr. Hawthorne testified (R. 33):

> "A mixture of alcohol and water only containing 3.2% of alcohol by weight would have more than 4% of alcohol by volume."

Next, the problem was approached considering a mixture of beer. Here again, the witnesses were in accord on the proposition that all beers containing 3.2 per cent of alcohol by weight would contain more than 4 per cent of alcohol by volume.

Thus, Mr. Dale testified: (R. 37)

> "Anytime solids in a mixture of alcohol and water are increased, there is an increase in the percentage of alcohol by volume over the percentage of alcohol by weight.
>
> "In a beer which contains 3.2% of alcohol by weight and 6.2 of solids, the alcoholic percentage by volume is 4.1. If the solid content in the beer is increased to 11.7, the alcoholic content in per cent by volume would be 4.2."

Mr. Means testified: (R. 33)

> "Ordinary beers contain other matters beside alcohol and water. A beer which contained 3.2% of alcohol by weight would contain more alcohol than 4% by volume. It would be 4.1% to 4.2% by volume."

Mr. Hawthorne testified: (R. 33-34)

> " * * * A beer which contains 3.2% of alcohol by weight will contain more than 4% of alcohol by volume. Such beers contain from 4 to 6½ and 7% of solid matter consisting of sugar, dextrine, glycerine and various mineral substances. An ordinary beer containing 3.2% of (fol. 48) alcohol by weight would contain 4.2 or 4.3% of alcohol by volume."

Next, the problem was approached from the viewpoint of an experimental potable alcoholic beverage containing 3.2 per cent of alcohol by weight with a high solid content and an alcoholic per cent by volume greatly in excess of 4 per cent by volume.

The witnesses were in accord upon the proposition that a mixture of alcohol, sugar and water could be prepared which would contain 3.2 per cent of alcohol by weight and 4.9 per cent of alcohol by volume.

Thus, Mr. Means testified: (R. 30-31)

> "The witness, sometime before testifying, prepared a solution of alcohol, sugar and water for the purpose of determining how much the percentage of alcohol would be in the solution if it was prepared so as to have 3.2% of alcohol by weight. The experimental solution contained 3.2% of alcohol by weight and approximately 4.9% of alcohol by volume. The witness is an average man and he tasted the solution and found it potable to him and he considered it potable to the average man."

Mr. Dale testified: (R. 37-38)

> "A mixture of alcohol, sugar and water as prepared experimentally by Mr. Means can be pre-

pared as he testified, viz., it would contain 3.2% of alcohol by weight and 4.9% of alcohol by volume.

"Any time solids in a mixture of alcohol and water are increased, there is an increase in the percentage of alcohol by volume over the percentage of alcohol by weight.

" * * * As there would be an increase in the solid content in the liquid, the change in the percentage by volume of the alcoholic content would continue to increase until you reach 4.9% by volume. The increase in the alcoholic content expressed in percentage by volume could exceed that figure.

"When the per cent of solids in the liquid is 48.1%, you would have an alcoholic content of 4.9% by volume."

Mr. Hawthorne testified: (R. 33)

"Mr. Means' testimony to the effect that a potable alcoholic beverage could be prepared which would be 3.2% of alcohol by weight and 4.9% of alcohol by volume is correct."

The witnesses were in agreement on the proposition that the distilled liquors, whiskey, brandy, gin, and rum contained water and alcohol and a slight amount of solids and that for practical purposes whiskey might be considered a mixture of alcohol and water.

Thus, Mr. Means testified: (R. 32-33)

"The average whiskey contains other things than water and alcohol in it, all depending upon how good a job the distiller did. The witness presumes that the other things in the average whiskey are probably one half of one per cent. For practical purposes whiskey is a mixture of alcohol and water. Whether it is only a mixture of alcohol and water

for the purpose of determining weight and volume per cent depends upon the purpose of the determination and the accuracy desired. The measurement can be extremely accurate up to the fifth place by the exercise of ordinary care depending upon the purpose for making the measurement.

"The average gin upon the market contains water, alcohol, glycerine and juniper. The witness did not know how much glycerine and juniper the average gin contained.

"Brandy is distilled wine, grape brandy being distilled from grape juices. Grape brandy contains about the same proportion of alcohol as whiskey. A table showing the relation of 'per cent by volume' and 'per cent by weight' in a solution of alcohol and water would show pretty closely the relation of 'per cent by volume' and 'per cent by weight' in a similar solution of whiskey, gin and brandy.

"There are a number of such tables and one by the United States Bureau of Standards, Circular number 19, page 18, 1924, is an authority. The witness does not regard it as 'the' authority.

"The witness was handed a table showing the relation between 'per cent by volume' and 'per cent by weight' in a solution of alcohol and water. The table showed that a solution of alcohol and water containing 4% of alcohol by volume contained 3.194% of alcohol by weight. The table was an abridged table. The relation between 'per cent by volume' and 'per cent by weight' shown by the (fol. 47) table were in accordance with the witness' personal experience.

"In an assumed whiskey which had other substances in it and which contained only 4% of alcohol by volume, it would come within several hundredths of a per cent of containing 3.2% of alcohol by weight. It is not usual in an ordinary commercial laboratory to carry calculations out to several hundredths of a per cent. In an ordinary commer-

cial laboratory under careful analysis per cent can be determined to a ten thousandth."

Mr. Dale testified: (R. 36)

"The witness is familiar with the chemical composition of whiskey, and gin. Other distilled liquors are whiskey, gin, brandy and rum. These liquors are mixtures of alcohol and water with some other substances.

"It is the witness's opinion that if whiskey, gin or brandy were prepared to contain 3.2% of alcohol by weight and the remainder was water and whatever other substances are generally in whiskey, that for practical commercial purposes the percentage of alcohol by volume would be 4%."

There was no evidence produced which contradicted the foregoing testimony. Nor, was there any evidence which in any way threw doubt upon the propositions established by the foregoing testimony.

Hence, the trial court's Finding of Fact number 6, if it was material, as follows:

" * * * that were a beverage prepared containing the same proportion of solids as the said liquors (whiskey, rum, gin, and brandy), only 3.2% of alcohol by weight and the remainder of water, that said liquors would contain 4% of alcohol by volume * * * ." (R. 42)

is not sustained by any evidence and is contrary to the evidence because all witnesses testified that a mixture of alcohol and water containing 3.2 per cent of alcohol by weight would contain more than 4 per cent of alcohol by volume and that whenever solids were present in a liquid the variation between 4 per cent of alcohol by volume was greater.

The trial court in the latter part of Finding of Fact number 6 found that beers and wines containing 3.2 per cent of alcohol by weight will have slightly in excess of 4 per cent of alcohol by volume and further found:

> " * * * that said excess is usually so small as to be disregarded in ordinary commercial laboratory tests." (R. 42.)

The trial court did not state what difference it made on the question of whether a measurement of 3.2 per cent of alcohol by weight was the same or less than a measurement of 4 per cent of alcohol by volume, even if it were true that in ordinary commercial laboratory tests it was usual to disregard the difference between a beer or wine which contained 3.2 per cent of alcohol by weight and a beer or wine which contained 4 per cent of alcohol by volume.

The usual practice of the commercial laboratories to disregard the difference does not appear to be material on the question as to whether there is a difference.

But if the practice of the commercial laboratories was material to the question before the Court, there was still no evidence to support the Finding and the Finding was contrary to the evidence.

All witnesses testified that a beer containing 3.2% per cent of alcohol by weight could at least contain 4.2 per cent of alcohol by volume.

Mr. Dale, the chemist in charge of the Alcohol Tax Unit Laboratory in Kansas City, Missouri testified that in testing alcoholic beverages in his laboratory, in the case of beer, they allowed possibly a variation of .05 of a per cent.

Thus, Mr. Dale testified: (R. 36 para. 2)

> "In testing alcoholic beverages in the laboratory where witness works, they allow a variation from the accepted standard. They, depending upon the necessity for accuracy, allow in the case of beer, possibly .05 of a per cent. The analysis can be made more accurately but ordinarily that is close enough."

Mr. Means testified that the commercial laboratories' practice was similar to the practice in the Alcohol Tax Unit Laboratory.

Thus, Mr. Means testified: (R. 32, 33)

> "It is not usual in an ordinary commercial laboratory to carry calculations out to several hundredths of a per cent. In an ordinary commercial laboratory under careful analysis per cent can be determined to a ten thousandth."

Mr. Hawthorne testifying concerning the practice in testing beers for solids testified: (R. 34, para. 2)

> "In testing beers for solids, the analysis is not usually carried beyond the first decimal point, sometimes to two. Carrying an analysis out to the third decimal point is done in the greatest precision work only. It is not done in ordinary commercial work."

None of the witnesses testified that it was a usual practice, in a commercial laboratory or any other kind of a laboratory, to disregard tenths of a per cent in testing alcoholic beverages for alcoholic content.

Mr. Dale testified that the Alcohol Tax Unit allowed the variation of possibly .05 of a per cent. Mr. Means testified that commercial laboratories allowed a varia-

tion of several hundredths of a per cent and Mr. Hawthorne was testifying about a test for solid content and not alcoholic content.

In Finding number 7, (R. 43), the trial court found that the United States Bureau of Standards Table, referred to in the evidence, showed that an alcoholic beverage containing 3.2 per cent of alcohol by weight would contain approximately 4 per cent of alcohol by volume. The only such table referred to in the evidence was referred to by Mr. Means and Mr. Dale. It was a table showing the percentages by weight corresponding to various percentages by volume in a mixture of Ethyl Alcohol and water.

Thus, Mr. Dale testified: (R. 35, 36)

> "The witness identified a portion of a book entitled Methods of Analysis A.O.A.C., Fourth Edition, 1935 published by the Association of Official Agricultural Chemists in Washington, D. C. His attention was directed to page XLIII in the supplement. That page contained a table showing percentages by weight corresponding to various percentages by volume at 60° Farenheit in mixtures of Ethyl Alcohol and water. It is a transcript of the Bureau of Standards Circular No. 19, page 18.
>
> "The Bureau of Standards is in the Department of Commerce and its purpose is to standardize various terms and standards. The table is a generally recognized authority in the chemical profession and regarded as an authority in the testing of alcohol and potable beverages. A mixture of Ethyl Alcohol and water containing 4% of alcohol by volume, by this table contains 3.194 of alcohol by weight. That figure is more accurately determined than is generally done in ordinary laboratory practice."

Mr. Means testified: (R. 32)

> "A table showing the relation of 'per cent by volume' and 'per cent by weight' in a solution of alcohol and water would show pretty closely the relation of 'per cent by volume' and 'per cent by weight' in a similar solution of whiskey, gin and brandy.
>
> "There are a number of such tables and one by the United States Bureau of Standards, Circular number 19, page 18, 1924, is an authority. The witness does not regard it as 'the' authority.
>
> "The witness was handed a table showing the relation between 'per cent by volume' and 'per cent by weight' in a solution of alcohol and water. The table showed that a solution of alcohol and water containing 4% of alcohol by volume contained 3.194% of alcohol by weight. The table was an abridged table. The relation between 'per cent by volume' and 'per cent by weight' shown by the (fol. 47) table were in accordance with the witness' personal experience."

Notwithstanding the foregoing evidence, which was uncontradicted, the Circuit Court affirmed the conviction of the Petitioner and in its opinion stated:

> " * * * From the testimony so presented (the testimony showing the relationship between a measurement of 3.2 per cent by weight and 4 per cent by volume) the court found in effect that an alcoholic beverage containing 3.2 per cent of alcohol by weight will contain approximately 4 per cent of alcohol by volume. This finding was sustained by substantial testimony." (R. 68.)

There was no evidence on the proposition that in any way modified the effect of the evidence heretofore set out in this petition. Hence, the evidence set out in this

petition is the only evidence necessary to consider in connection with the Circuit Court's statement as to what the trial court found.

The Circuit Court then set out in its opinion a portion of the Report of the House Committee on the Judiciary, 74th Congress, First Session, Report No. 1258 as follows:

> " * * * The bill extends this affirmative protection to States which forbid all sales for beverage purposes of intoxicating liquor containing more than 4 per cent of alcohol by volume (3.2 per cent of alcohol by weight). Your committee felt it was essential to protect States which permit the sale of liquor containing as much as 4 per cent of alcohol by volume, in order to keep faith with the action taken by Congress in the so-called 'Cullen Beer Act' of March 22, 1933." (R. 69.)

The paranthetical insertion in the portion of the Committee's report set out in the Circuit Court's opinion sustains the inference that the Committee believed and therefore, possibly Congress, itself, believed at the time it passed the Liquor Enforcement Act of 1936, that the terms "3.2 per cent of alcohol by weight" and "4 per cent of alcohol by volume" provided for identical measurements, to the same effect as would be the case in terms that provided for a measurement of one foot in one case and 12 inches in another.

The Circuit Court's opinion shows that it consulted scientific authorities—Department of Commerce Bureau of Standards, Remington's Practice of Pharmacy, Rogers' Manual of Industrial Chemistry and Standard Encyclopedias. These authorities, the Court found, were to the effect "that 4 per cent of alcohol by volume and 3.2

per cent of alcohol by weight are substantially identical."

The Court found that the scientific authorities consulted by it were corroborative of the testimony in the case. Thus, it said:

> "These authorities are corroborative of the testimony in this case, * * * ." (R. 69 Para. 5.)

Aside from the references made by the chemists, Mr. Dale and Mr. Means in their testimony, (R. 35, 32) to the transcript of the Bureau of Standards Circular No. 19, page 18, which was:

> " * * * a table showing percentages by weight corresponding to various percentages by volume at 60° Fahrenheit in mixtures of Ethyl Alcohol and water."

and which was not introduced into evidence, there was no mention made of any scientific authorities in the trial court.

The authorities which the Circuit Court stated it had consulted and which it found were to the effect that "4 per cent of alcohol by volume and 3.2 per cent of alcohol by weight are substantially identical" were not in evidence in the case. Nor, were said authorities cited to the Circuit Court by either the appellant or the appellee.

The Circuit Court's consideration of the scientific authorities mentioned in its opinion was done upon its own resources.

In affirming the conviction of the Petitioner and holding that the Liquor Enforcement Act of 1936 applied to the transportation of intoxicating liquor into

the state of Kansas, the Circuit Court based its decision upon a combination of the following three propositions:

1. The evidence supported the trial court's Finding of Fact which the Circuit Court construed to be "in effect that an alcoholic beverage containing 3.2 per cent of alcohol by weight will contain approximately 4 per cent of alcohol by volume."

2. Its independent investigation of scientific authorities which it found corroborated the evidence upon which the trial court's Finding was based.

3. Its consideration of the legislative history of the enactment of the Liquor Enforcement Act of 1936, viz., the Report of the Committee on the Judiciary of the House of Representatives and its examination of the so-called Cullen Beer Act.

Thus, it was said in the opinion of the Circuit Court:

"It appearing affirmatively from the evidence as well as from the recognized scientific authorities and the legislative history of the enactment of the Liquor Enforcement Act of which we may take judicial notice, that the Liquor Enforcement Act is applicable to the State of Kansas, the judgment of conviction appealed from is affirmed. (R. 70.)

STATEMENT OF PETITIONER'S CONTENTION AS TO THE BASIS OF AUTHORITY OF THE SUPREME COURT OF THE UNITED STATES TO REVIEW THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT IN THIS CAUSE.

The judgment of the Circuit Court of Appeals, Eighth Circuit which this Petitioner seeks to have reviewed was entered on the 8th day of July 1941. (R. 70-71.) It affirmed Petitioner's conviction for a violation of the Liquor Enforcement Act of 1936 (27 U.S.C. 233).

28 U.S.C. 347 provides that in any case, civil or criminal, in a circuit court of appeals, it shall be competent for the Supreme Court of the United States, upon petition of any party thereto, whether Government or other litigant, to require by certiorari after the judgment of such lower court that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought to the Supreme Court by unrestricted appeal.

Paragraph XI of Rules of Practice and Procedure After Plea of Guilty, Verdict or Finding of Guilt, in Criminal Cases Brought in the District Courts of the United States promulgated by the Supreme Court of the United States pursuant to the provisions of the act of Congress approved March 8, 1934, amending an act entitled "An Act to give the Supreme Court of the United States authority to prescribe rules of practice and procedure with respect to proceedings in criminal cases after verdict." (Act of Feb. 24, 1933, 47 Stat. at L. 904, Ch. 119, 28 U.S.C.A. 723a) provides that petitions to the Supreme Court of the United States for writ of

certiorari to review a judgment of the appellate court shall be made within thirty days after the entry of the judgment of that court.

In view of the nature of this case, the date upon which the Circuit Court of Appeals, Eighth Circuit, entered its judgment, and in view of the statutes and court rules above mentioned, the Supreme Court of the United States has jurisdiction to review the aforesaid judgment of the Circuit Court by issuing a writ of certiorari herein. This Petition for a writ of certiorari is filed on or before August 12, 1941. (Rules of Practice and Procedure in Criminal Cases Promulgated by the Supreme Court of the United States, May 7, 1934. Para. 2 of Rule XIII)

THE QUESTION PRESENTED.

The question presented is:

Whether, when a Federal statute prohibits the attempt to transport intoxicating liquor into a State if, and only if, the State prohibits all sales for beverage purposes of intoxicating liquor containing more than 4 per cent of alcohol by volume, making it a misdemeanor so to do, and a State does not prohibit all sales for beverage purposes of intoxicating liquor containing more than 4 per cent of alcohol by volume but does prohibit all sales of intoxicating liquor containing more than 3.2 per cent of alcohol by weight, which latter measurement will always permit an intoxicating liquor to contain more than 4 per cent of alcohol by volume, although the difference is not great, and the Federal statute is not ambiguous as to defining the States protected by it, but it appears from consulting the Congressional Report which accompanied the act to Congress

when it was submitted for passage that the Committee making the report believed that the two measurements, 4 per cent of alcohol by volume and 3.2 per cent of alcohol by weight, provided for identical measurements, it is a crime to attempt to transport intoxicating liquor into a State which only prohibits all sales for beverage purposes of intoxicating liquor containing more than 3.2 per cent of alcohol by weight.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. While there is no conflict between the various Circuit Courts at the present time over the question involved, there is a conflict between the various District Courts. *United States v. Robason,* (D.C. Kan.) 38 Fed. Supp. 991 holds the Liquor Enforcement Act of 1936 applies to the State of Kansas and then points out the conflict between the various District Courts as follows, p. 995:

> "It is interesting to note that in the neighboring state of Missouri the District Judges are not in agreement concerning the Kansas law.
>
> "In United States v. 1940 Model Dodge Coupe, Motor No. D14-191545, No. 674, Judge Merrill E. Otis was of the opinion that the Kansas statute was insufficient.
>
> "On the other hand, Judge Albert Reeves on January 14, 1941, in United States v. Arnold, D.C., 38 F. Supp. 863, was of the opinion the Kansas law qualified Kansas for protection under the Twenty-First Amendment and the Liquor Enforcement Act of 1936."

2. If the basis for the Circuit Court's affirmance of the Petitioner's conviction is that the evidence estab-

lished beyond a reasonable doubt that the two measurements were approximately the same in the sense that there was no legal difference, then the Circuit Court decided an important question of Federal law which has not but should be settled by this Honorable Court and, further, it has decided a Federal question in a way probably in conflict with applicable decisions of this Court, because embraced in such a decision is the proposition of punishing one for the violation of a Federal statute when the acts charged and proved are not plainly within the statute; also, the proposition of creating a Federal offense by construction, both of which propositions have been denied by this Court.

United States v. Resnick, 299 U. S. 207, 81 Law Ed. 127.

3. If the basis of the Circuit Court's affirmance of the Petitioner's conviction is that its examination of the Congressional Report convinced it that Congress intended the Liquor Enforcement Act of 1936 to apply to states which only prohibited all sales of intoxicating liquor containing more than 3.2 per cent of alcohol by weight and that therefore, the act would be construed to apply to the State of Kansas, then the Circuit Court decided a Federal question in a way probably in conflict with applicable decisions of this Court because the act is not ambiguous as to its definition of the states affected by it and under such circumstances, the fact that Congress may have intended something else as shown by Congressional Reports and debates and other data cannot be considered by a Court. *Merritt v. Welsh*, 104 U.S. 694, 702-703; *Hamilton v. Rathbone,* 175 U.S. 414, 419; *Thompson v. United States,* 246 U.S. 547, 550.

4. If the Circuit Court's independent investigation of the relationship between the terms "3.2 per cent by

weight" and "4 per cent by volume" brought it to a different conclusion as regards that relationship then the conclusion that would be justified by a consideration of the undisputed evidence in the record upon the subject, then it has decided a Federal question in a way probably in conflict with applicable decisions of this Court and, further, has so far departed from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision because while Courts may take judicial knowledge of certain well established facts, they are required to exercise this power with caution, and if there is a reasonable doubt, as there would be here, if the Court in its independent investigation, reached a conclusion different than that that would be justified by considering the evidence upon the subject, the Court must resolve the question in the negative and refuse to take judicial knowledge of the matter in question. *Brown v. Piper,* 91 U.S. 37, 42-43; *Edwards v. U.S.,* 61 Sup. Ct. Rep. 669, 81 Law Ed. 563.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals, Eighth Circuit, should be granted.

WALTER R. DOLLOFF,
Petitioner;

L. P. BROOKS,
A. V. ROBERTS,
All Of Wichita, Kansas,
Counsel for Petitioner.

R. BOWLAND RITCHIE,
Of Wichita, Kansas,
of Counsel,

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS EIGHTH CIRCUIT.

OPINIONS.

Findings of Facts and Conclusions of Law on the Petitioner's Plea in Bar were made by the Honorable John Caskie Collet, District Judge, Eastern and Western Districts of Missouri and filed November 5, 1940. They have not been officially reported, but appear in the record, pages 40 to 44 inclusive.

The opinion of the Circuit Court of Appeals (Circuit Judges Gardner, Woodrough and Johnsen, Judge Gardner writing) was filed July 8, 1941. It has not yet been officially reported, but apppears in the record on pages 65 to 70 inclusive.

GROUNDS UPON WHICH JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS INVOKED HEREIN.

The grounds upon which Petitioner seeks to invoke the jurisdiction of this Court are fully set out at pages 22 to 23 inclusive of the Petition to which this brief is appended and reference is hereby made thereto. Therefore, said grounds will not be restated here.

STATEMENT OF THE CASE.

The case has been fully stated in the Petition and reference is here made to the Summary Statements in the Petition and to the Question Presented as set forth therein for a statement of the case.

SPECIFICATION OF ASSIGNED ERRORS.

I.

The Circuit Court erred in affirming Petitioner's conviction for violating the Liquor Enforcement Act of 1936 because the undisputed evidence showed that the State of Kansas did not prohibit all sales of intoxicating liquor containing more than 4 per cent of alcohol by volume.

II.

The Circuit Court erred in affirming Petitioner's conviction for a violation of the Liquor Enforcement Act of 1936 because the Liquor Enforcement Act of 1936 is unambiguous as to the States affected by it and therefore the Circuit Court erred in considering the Congressional Report and the history of the Act in order to construe the unambiguous statute as to the States affected by it.

III.

The Circuit Court erred in affirming the Petitioner's conviction for a violation of the Liquor Enforcement Act of 1936 by departing from the record and considering evidence that was not in the record and which could not properly be considered a matter of judicial knowledge.

POINTS AND AUTHORITIES.

I.

The Liquor Enforcement Act of 1936 is not ambiguous as to its definition of the States affected by it, i. e., those States which prohibit all sales of intoxicating liquor containing more than 4 per cent of alcohol by volume.

See Analysis of Section 3 of the Liquor Enforcement Act of 1936 in Argument, pages 31 to 40 inclusive.

Also, *Arnold v. United States,* 115 Fed. (2d) 525; *Gregg v. United States,* 116 Fed. (2d) 609.

II.

The various District Courts disagreed as to whether the Liquor Enforcement Act of 1936 applies to the State of Kansas.

See *United States v. Robason,* 38 Fed. Supp. 991.

United States v. Arnold, 38 Fed. Supp. 863;

United States v. 1940 Model Dodge Coupe, Unreported, pertinent portion of the opinion being set out at pages 43 to 45 inclusive of this brief.

III.

Disregarding the difference between the Federal and Kansas statutes creates a Federal offense by construction probably contrary to the applicable decisions of this Court.

United States v. Resnick, 299 U. S. 207, 81 Law Ed. 127.

IV.

Construing an unambiguous statute on the point involved herein is probably in conflict with the applicable decisions of this Court.

United States v. Wiltberger (5 Wheat.) 18 U. S. 76, 95-96;

Merritt v. Welsh, 104, U. S. 694, 702-703;

Hamilton v. Rathbone, 175 U. S. 414, 419;

Thompson v. United States, 246 U. S. 547, 550.

V.

Where the Circuit Court in a case on appeal makes its independent investigation of the facts from sources outside the record and reaches a conclusion contrary to the undisputed evidence upon the question, contained in the record, it has departed from the usual and accepted course of judicial

proceedings and its independent conclusion cannot be sustained on the grounds of judicial notice.

Edwards v. United States, 61 Sup. Ct. Rep. 669, 81 Law. Ed. 563;

Brown v. Piper, 91 U. S. 37, 42-43.

ARGUMENT.

GENERAL STATEMENT.

The question involved embraces four fundamental propositions.

They are:

1. The Liquor Enforcement Act of 1936 provides unambiguously that it applies only to such States as prohibit all sales for beverage purposes of intoxicating liquor containing more than 4 per cent of alcohol by volume.

2. The State of Kansas only prohibits all sales of intoxicating liquor containing more than 3.2 per cent of alcohol by weight.

3. A measurement of 3.2 per cent of alcohol by weight will always permit an intoxicating liquor to contain more than 4 per cent of alcohol by volume.

4. A consideration of the Report of the Committee on the Judiciary of the House of Representatives furnishes grounds for the inference that the Committee believed and therefore, possibly Congress, itself, believed, at the time it passed the liquor Enforcement Act of 1936, that a measurement of 4 per cent of alcohol by volume was identical with a measurement of 3.2 per cent of alcohol by weight.

Propositions two, three, and four have been demonstrated in the Petition. We will here, first demonstrate proposition one before addressing ourselves to the question as to whether this Court should grant the writ prayed for in the Petition.

THE LIQUOR ENFORCEMENT ACT OF 1936 IS NOT AMBIGUOUS AS TO ITS DEFINITION OF THE STATES AFFECTED BY IT.

GENERAL STATEMENT.

The Liquor Enforcement Act of 1936 was designed to enforce the twenty-first Amendment to the Constitution of the United States and thereby to protect "dry" States against liquor law violations directed from outside their borders.

"Dry" States were defined by the Act to be those States which prohibited all sales for beverage purposes of intoxicating liquor containing more than 4 per cent of alcohol by volume.

ANALYSIS OF SUBSECTION (A) OF SECTION 3 OF THE LIQUOR ENFORCEMENT ACT OF 1936.

That Congress accomplished this purpose is immediately apparent from an analysis of Subsection (a) of Section 3 of the Act, which, stripped of all unnecessary verbiage for the purpose of considering what States are affected by the Act, that is to say, what States are "dry" States, is as follows:

> "Whoever shall import * * * any intoxicating liquor into any State in which all sales (except for scientific * * * etc., * * * purposes) of intoxicating

liquor containing more than 4 per centum of alcohol by volume are prohibited * * * or attempt so to do * * * shall * * * be guilty of a misdemeanor * * * ."

Consideration of the foregoing shows clearly and indisputably that the States affected by the Act are such States, and only such States, as prohibit all sales for beverage purposes of intoxicating liquor containing more than 4 per cent of alcohol by volume.

CONSIDERATION OF THE PURPOSE OF THE OTHER MATERIAL IN SECTION 3.

Is this definition of a "dry" State altered or rendered ambiguous by any other provision of the Act?

We think not. To answer this question, it is perhaps well to now consider the Act as a whole. When this is done, it will be seen that the Act is clear, well integrated and unambiguous. Nothing is amiss and, except for the fact that portions of the Committee's Report (which portions will hereinafter be commented upon) indicate that the Committee believed that "4 per cent by volume" and "3.2 per cent by weight" were synonymous terms, the Congressional intent is clear from a reading of Section 3 of the Act.

As pointed out above, the Act was designed to enforce the twenty-first Amendment and to protect "dry" States from liquor law violations directed from outside their borders. Further, it was drafted with the policy of the twenty-first Amendment in mind—that the Federal Government would not impose a more drastic prohibition upon the various States than the States themselves wanted. Also, Congress had in mind the practical dif-

ficulties of enforcing the Liquor Enforcement Act. It had in mind that practically all States which would want to be "dry" States permitted the sale of intoxicating liquor for scientific, medicinal, mechanical and sacramental purposes. Further, it had in mind that some States might prohibit the sale for beverage purposes of intoxicating liquor containing less than 4 per cent of alcohol by volume.

If all these things are borne in mind in examining Section 3 of the Liquor Enforcement Act of 1936, it will be observed that said section is clear, well integrated and, what is more important here, that there is nothing in the section which in any way throws doubt upon the perfectly apparent intention of the Act, as noted above:—That the Act applies only to such States as prohibit all sales for beverage purposes of intoxicating liquor containing more than 4 per cent of alcohol by volume.

We may further test the question of whether or not the 4 per cent provision of Subsection (a) is rendered ambiguous by any other provision of Section 3 by asking a few questions and examining Section 3 to find the answer to them. Thus:

Is It Necessary for a State to Prohibit all Sales of Intoxicating Liquor Containing More Than 4 per cent of Alcohol by Volume Before it Comes Within the Protection of The Liquor Enforcement Act of 1936?

Answer: No, Subsection (a) provides:

"Whoever shall import * * * any intoxicating liquor into any State in which all sales (except for scientific, * * * etc. * * * purposes) of intoxicating liquor containing more than 4 percentum of alco-

hol by volume are prohibited * * * shall be guilty * * *."

Therefore, any State which prohibits all sales for beverage purposes of intoxicating liquor containing more than 4 per cent of alcohol by volume is, if otherwise qualified, within the protection of the Act. It may permit sales of intoxicating liquor containing any per cent of alcohol for scientific, sacramental, medicinal or mechanical purposes without imparing its right to protection under the Act.

Is a State Required to Prohibit All Importation of Intoxicating Liquor Into Its Boundaries in Order to be Within the Protection of the Act:

(a) If the Importation is For Scientific, Sacramental, Medicinal, or Mechanical Purposes?

(b) If the Importation is For Beverage Purposes?

Answer: The Act does not require a State to prohibit any kind of transportation of intoxicating liquor in order to have the protection of the Act. All that is required is that a State prohibit all sales for beverage purposes of intoxicating liquor containing more than 4 per cent of alcohol by volume. A State can permit the importation of intoxicating liquor containing any per cent of alcohol for either beverage, scientific, sacramental, medicinal or mechanical purposes and still be within the protection of the Act, provided it establishes a licensing or permit system for the importation of such intoxicating liquor as it permits to be imported.

Thus, the Act says:

> "Whoever shall import * * * any intoxicating liquor into any State in which all sales (except for scientific * * * etc., * * * purposes) containing more than 4 percentum of alcohol by volume are prohibited * * * shall: (1) If such liquor is not accompanied by such permit or permits, license or licenses therefor as are now or hereafter required by the laws of such state * * * be guilty * * * ."
> *Dunn v. United States,* 98 Fed. 2d 119 (C.C.A. 10).

If a State Prohibits all Sales for Beverage Purposes of Intoxicating Liquor Containing More Than 4 Per Cent of Alcohol by Volume, Must it Establish a License System for the Importation of Intoxicating Liquor in Order to be Within the Protection of the Act?

Answer: No. If a State permits the importation of any intoxicating liquor for beverage purposes, or otherwise, it must establish a licensing system for such importation even though it is a 4 per cent state in order to have the protection of the Act. But, if a State is a 4 per cent State and if it prohibits all importation of intoxicating liquor, it is within the protection of the Act even though it has no permit system for the importation of intoxicating liquor.

Thus, the Act says:

> "Whoever shall import * * * any intoxicating liquor into any State in which all sales (except for scientific * * * etc., * * * purposes) of intoxicating liquor containing more than 4 percentum of alcohol by volume are prohibited * * * shall * * * (2) if all importation * * * of intoxicating liquor into

such State is prohibited by the laws thereof; be guilty * * * ."

If a State Prohibits the Sale for Beverage Purposes of All Intoxicating Liquor Containing More Than 4 Per Cent of Alcohol by Volume and Defines Intoxicating Liquor as All Alcoholic Beverages Containing More Than 4 Per Cent of Alcohol by Volume and Has a Licensing or Permit System for Such Intoxicating Liquor as it Permits to be Imported:

(a) Is it a Violation of the Act to Import Without a Permit Intoxicating Liquor Containing Only 4 Per Cent or Less of Alcohol by Volume?

(b) Would it be a Violation of the Act to Import, Without a License, Intoxicating Liquor Containing 5 Per Cent of Alcohol by Volume, if the Tryor of the Facts—The Court or Jury—Should find that Such Intoxicating Liquor was not Intoxicating in Fact?

(c) If the Situation is Otherwise as Stated in the Preamble of this Question, Except that the State in Question Defines Intoxicating Liquor as all Alcoholic Beverages Containing more than One Half of 1 Per Cent of Alcohol by Volume Would it be a Violation of the Act to Import into a State Intoxicating Liquor Containing Only 4 per cent of Alcohol by Volume Without a Permit from the State so to do?

(d) If the Situation were Otherwise as Stated in the Preamble to this Question, Except that the State in Question Prohibited all Sales of Intoxicating Liquor Containing More than One Half of 1 Per Cent of Alcohol by Volume and Defined Intoxicating Liquor as all Alcoholic Beverages Containing More than One Half of 1 Per Cent of Alcohol by Volume, Would it be a

Violation of the Act to Import into such a State, Without a Permit, Intoxicating Liquor Containing 1 Per Cent of Alcohol by Volume Even Though the Tryor of the Fact should Find that such Intoxicating Liquor was not Intoxicating in Fact?

Answer to Question (a):

It is no violation of the Act because Subsection (b) provides that to determine whether one transporting intoxicating liquor into a State is acting in violation of the Act, "the definition of intoxicating liquor contained in the laws of such State shall be applied, but only to the extent that sales of such intoxicating liquor [i. e., the intoxicating liquor as defined by the laws of such State] (except for scientific * * * etc., * * * purposes) are prohibited in such State."

Since the liquor in question (a) contains only 4 per cent of alcohol by volume and since the laws of the State in question, as assumed in said question, prohibit all sales for beverage purposes of intoxicating liquor containing more than 4 per cent of alcohol by volume and define intoxicating liquor as all alcoholic beverages containing more than 4 per cent of alcohol by volume the application of the laws of the State to intoxicating liquor being transported, as stated in the question, shows that the sale of intoxicating liquor containing 4 per cent of alcohol by volume is not prohibited. Therefore, no license is required to import 4 per cent by volume intoxicating liquor into the State.

Answer to question (b):

It would be a violation to transport the intoxicating liquor even though it was not intoxicating in fact, as

stated in the question because the State prohibits all sales of intoxicating liquor containing more than 4 per cent of alcohol by volume and applying the State's definition of intoxicating liquor, the intoxicating liquor here being transported is intoxicating liquor within the State's definition, the sale of which is prohibited by the laws of the State.

Answer to Question (c):

Here there would be no violation of the Act because, while the State prohibits all sales for beverage purposes of intoxicating liquor containing more than 4 per cent of alcohol by volume, and is as respects this matter, within the protection of the Act, and while the intoxicating liquor being transported is intoxicating liquor within the meaning of the State law, still, since the State does not prohibit all sales of intoxicating liquor as defined by its laws, it is found that there is no violation of the Act when the State's definition is applied to the liquor being transported "only to the extent that sales of such intoxicating liquor (except for scientific * * * etc., * * * purposes) are prohibited in such State."

Answer to Question (d):

Where the State defines intoxicating liquor as all alcoholic beverages containing more than one-half of 1 per cent of alcohol by volume and prohibits the sale of intoxicating liquor for beverage purposes and has established a licensing system for the importation of such intoxicating liquor as it permits to be imported, it would be a violation of the Act to transport intoxicating liquor containing 1 per cent of alcohol by volume into such State, even though the transported liquor was

not intoxicating in fact, because in applying such State's definition of intoxicating liquor "to the extent that sales of such intoxicating liquor (except for scientific * * * etc., * * * purposes) are prohibited in such State," it is found that the intoxicating liquor being transported is intoxicating liquor under the laws of the State, the sale of which is prohibited.

If the State Prohibits All Sales of Intoxicating Liquor Containing More Than 4.2 Per Cent of Alcohol by Volume and Defines Intoxicating Liquor as All Alcoholic Beverages Containing More Than 4.2 Per Cent of Alcohol by Volume, Is it a Violation of the Act to Transport Whiskey into the State Without a Permit so to do?

Answer: Applying the State's definition of intoxicating liquor to the whiskey being transported shows that the whiskey is intoxicating liquor under the laws of the State into which it is transported. Also, applying the State's definition to the whiskey, it is intoxicating liquor, the sale of which is prohibited by the laws of the State. But still, there is no violation of the Act. The condition of Subsection (a) has not been complied with. The State has not prohibited all sales of intoxicating liquor containing more than 4 per cent of alcohol by volume. Hence, the Act is no more applicable to that State than it would be if the State did not prohibit all importation of intoxicating liquor and had failed to provide for a licensing system for the importation of intoxicating liquor which it did permit. *Dunn v. United States,* 98 Fed. 2d 119 (C.C.A. 10.)

CONCLUSION AS TO THE PROPOSITION THAT THE LIQUOR ENFORCEMENT ACT OF 1936 IS NOT AMBIGUOUS AS TO ITS DEFINITION OF THE STATES AFFECTED BY IT.

The foregoing demonstrates that the Liquor Enforcement Act of 1936 is not ambiguous as regards its definition of the States affected by it. Thus, by analysis of Subsection (a) of Section 3 it has been shown that the States protected are those, and only those, which prohibit all sales for beverage purposes of intoxicating liquor containing more than 4 per cent of alcohol by volume. Further, it has been shown that there is nothing further in the Act which in any way modifies the 4 per cent provision of Subsection (a). This has been done by considering piece by piece, so to speak, the other material in the Act and thereby showing that such material did not change the 4 per cent feature of Subsection (a) and further showing thereby that such material had a definite purpose in meeting the varied situation to which the Act might be required to apply.

Thus the 4 per cent feature of Subsection (a) is not ambiguous.

ARGUMENT IN SUPPORT OF THE GRANTING OF THE PETITION FOR CERTIORARI.

GENERAL STATEMENT.

In the Petition, we have set out the evidence from which it appears that the trial Court could have made no other Finding but that a measurement of 3.2 per cent of alcohol by weight would always permit an intoxicating liquor to contain more than 4 per cent of alcohol by volume. (p. 9-18.)

In the preceeding section of this brief, we have pointed out the reasons why the Liquor Enforcement Act of 1936 is unambiguous as to its definition of the States protected by it, i. e., States which prohibit all sales for beverage purposes of intoxicating liquor containing more than 4 per cent of alcohol by volume.

The Kansas statutes dealing with the prohibiting of the sale of intoxicating liquors are set out in the Circuit Court's opinion. (R. 67). These statutes show that Kansas only prohibits all sales for beverage purposes of intoxicating liquor containing more than 3.2 per cent of alcohol by weight.

The portion of the report of the Judiciary Committee of the House of Representatives which indicates that the Committee believed that the terms "4 per cent by volume" and "3.2 per cent by weight" provided for identical measurements is set out in the opinion of the Circuit Court (R. 69 para 3).

Thus, are established, the four basic propositions of the question involved, to-wit:

1. The Liquor Enforcement Act of 1936 provides unambiguously that it applies only to such States as prohibit all sales for beverage purposes of intoxicating liquor containing more than 4 per cent of alcohol by volume.

2. The State of Kansas only prohibits all sales of intoxicating liquor containing more than 3.2 per cent of alcohol by weight.

3. A measurement of 3.2 per cent of alcohol by weight will always permit an intoxicating liquor to contain more than 4 per cent of alcohol by volume.

4. A consideration of the Report of the Committee on the Judiciary of the House of Representatives furnishes grounds for the inference that the

> Committee believed and therefore, possibly Congress itself, believed, at the time it passed the Liquor Enforcement Act of 1936, that a measurement of 4 per cent of alcohol by volume was identical with a measurement of 3.2 per cent of alcohol by weight.

These propositions having been established, we come now to the consideration of the reasons urged for the granting of the writ herein.

1. THE CONFLICT ON THE QUESTION BETWEEN THE DISTRICT COURTS.

The case of *United States v. Robason,* (D. C. Kan.) 38 Fed. Supp. 991, holds that the Liquor Enforcement Act of 1936 applies to the state of Kansas and then points out at page 995 the conflict between the District Courts as set out heretofore in the Petition (p. 24).

This conflict between the District Courts in and of itself is not sufficient reason for the issuance of the writ herein. However, it does shed some light upon the importance of the question involved. Further, a consideration of the opinions of the various District Courts, published and unpublished, in connection with a consideration of the Circuit Court's opinion in the instant case, throws further light upon the importance of the question involved herein. The Circuit Court's opinion does not specifically point out the possible variations from 4 per cent of alcohol by volume where an alcoholic beverage contains 3.2 per cent of alcohol by weight. However, the two District Court opinions on the question, which have been published, *United States v. Arnold,* (D. C. West. Dist. of Mo.) 38 Fed. Supp. 863 and *United States v. Robason,* (D. C. Kan.) 38 Fed. Supp. 991, do mention the variation.

Thus, the Honorable Albert L. Reeves, District Judge, stated in *United States v. Arnold,* supra, 864:

> "Now, then, the state of Kansas says that above 3.2 per cent of alcohol by weight is intoxicating. 3.2 per cent by weight, as I understand, would equal four per cent by volume, 4.6, 4.8 or 4.9 or maybe 4.16 or 4.29 per cent on beer. * * * So that the state of Kansas provides that beer containing 4.15 per cent or 4.16 per cent by volume is not intoxicating. That is what the law of Kansas provides under all this testimony."

The Honorable Richard J. Hopkins, District Judge, in *United States v. Robason, supra,* quotes the Findings of Fact made by Judge Collet in the instant case especially Finding of Fact No. 5 at page 995.

Thus, although the Circuit Court's opinion herein only refers to the variation between the two measurements by stating that the trial Court found in effect upon substantial evidence "that an alcoholic beverage containing 3.2 per cent of alcohol by weight will contain approximately 4 per cent of alcohol by volume," the Arnold and Robason cases, supra, state the variation in specific terms, which at least tend to show what the Circuit Court meant by the use of the term "approximately" in its opinion.

In the case referred to by Judge Hopkins, in his opinion in the Robason case, supra, at page 995, United States v. 1940 Model Dodge Coupe, Motor No. D14-191545,No. 674 (D. C. West. Dist of Mo.), the opinion in which is unreported, Honorable Merrill E. Otis, District Judge, said:

> "The Court: It seems to me that the question presented here is quite a simple question. I am

very familiar, of course, with the case which was presented recently to the Court of Appeals since I sat on the Court of Appeals in that case." [*Arnold v. United States,* 115 Fed. 2d 525] "That was a criminal case in which the defendant had been found guilty of a violation of the Act of Congress and in which the only question that troubled the Court was whether the Act of Congress applied to Kansas. And that is the only question that is presented in the case here."

* * * *

"The statute, that is the federal statute, says, 'Whoever shall import, bring, or transport any intoxicating liquor into any state in which all sales of intoxicating liquor containing more than four percentum of alcohol by volume are prohibited, shall, except under certain circumstances'—with which we are not concerned here—'be guilty of a misdemeanor.' 'Whoever shall import, bring, or transport any intoxicating liquor into any state in which all sales of intoxicating liquor containing more than four percentum of alcohol by volume are prohibited, shall be guilty of a misdemeanor.'

"The only question is, is Kansas a state in which all sales of intoxicating liquor containing more than four percent of alcohol by volume are prohibited? If it is such a state, then the law applies to Kansas and the plaintiff should prevail in this proceeding. If it is not such a state, then the law does not apply to Kansas and the plaintiff cannot prevail in this proceeding.

"Why Kansas, when it enacted its intoxicating liquor laws, if it desired, as it said it did in so many words, to take advantage of the Federal Act, did not prohibit the sale in that state of all intoxicants containing more than four percent of alcohol by volume, I do not know. Perhaps it is because Kansas always does things in its own way. It prohibited sales of intoxicating liquors containing more than 3.2 percent of alcohol by weight.

"Now, the question is, are they the same thing? Well, that is a matter that only can be determined by investigation and research and evidence."

* * * *

"The difficulty with the Government's position is that, considering standard beverages, beer, for example, the testimony of the expert called by the Government, it appears, it seems to me, shows conclusively that it cannot be said that Kansas prohibits all sales of intoxicating liquors containing four per cent or more than four percent by volume. The witness for the Government has testified that as to beer, as to two grades of beer about which he gave testimony, 3.2 per cent by weight was equivalent in the case of one grade of beer to 4.07 by volume, and in the case of another grade of beer, to 4.16 by volume. Very obviously any beer which fell between four percent and 4.07 or 4.16 per cent is not prohibited, the sale of that beer is not prohibited in Kansas."

* * * *

"I conclude as a matter of law, upon the testimony introduced here, that the State of Kansas did not at the time of the transportation referred to and the seizure, prohibit all sales of intoxicating liquors containing more than four percent by volume and that, therefore, the use of the automobile in question was not in violation of the federal law, and that its seizure was not justified under the law."

2. DISREGARDING THE DIFFERENCE BETWEEN THE FEDERAL AND KANSAS STATUTES CREATES A FEDERAL OFFENSE BY CONSTRUCTION.

As pointed out in the Petition, the basis of the Circuit Court's decision cannot be laid hold of and assigned to one legal proposition alone. (p. 21.) The opinion seems

to be bottomed upon three different legal principles. (p. 21) Hence, each possible principle involved must be discussed.

If the Circuit Court considered the difference between the measurements legally inconsequential and affirmed the Petitioner's conviction upon that ground, it extended a Federal criminal statute to facts not clearly within the statute and thereby created a Federal offense by construction.

This Court has held that Federal criminal statutes must be strictly construed; that they cannot be extended to cover offenses not clearly within the statute; and that Federal offenses cannot be created by construction.

This rule has been announced by this Court innumerable times. Probably one of the most recent announcements by the Court upon this subject is in *United States v. Resnick,* 299 U. S. 207 where it was said:

> (Syl. 2, 3, and 4).
>
> "2. Statutes creating crimes are to be strictly constructed in favor of the accused and may not be held to extend to cases not covered by the words used."
>
> "3. The plain words of a statute must be given a meaning naturally attributable to them."
>
> "4. Before one may be punished for violating a statute it must appear that his case is plainly within the statute; there are no constructive offenses."

This principle is well founded in our law and abundantly supported by authorities.

In *United States v. Ragsdale,* (Hempst. 479, Fed. Cas. 16,113, 27 Fed. Case 684, 686) District Judge Johnson writing the opinion, it was said:

> "It has, however, been earnestly contended on the part of the United States by the District Attorney, that even admitting that the letter and words of the treaty apply to and embrace the defendant's case, that it is clearly not within the spirit and intention of the treaty. It is a sound rule in the construction of penal statutes, that if the case of the accused is clearly within the letter of a statute in his favor, the Court will rarely, if ever, take his case out of it, upon the ground that it is not within the spirit and intent of the Act."

Thus, if the basis of the Court's decision was that the variation between the two measurements was legally inconsequential, its decision was probably in conflict with the applicable decisions of this Court upon a Federal question.

3. IF THE CIRCUIT COURT'S DECISION IS BOTTOMED UPON THE CONSTRUCTION OF AN UNAMBIGUOUS STATUTE, IT DECIDED A FEDERAL QUESTION IN A WAY PROBABLY IN CONFLICT WITH THE APPLICABLE DECISION OF THIS COURT.

If the Circuit Court's decision is bottomed on the fact that its examination of the Congressional Report and the history of the Act convinced it that Congress intended the Act to apply to states which only prohibited all sales of intoxicating liquor containing more than 3.2 per cent of alcohol by weight and that it would therefore thus construe the Act, it, by contstruing an unambiguous statute, as regards the states affected by the Act, decided an important Federal question which has not but should be decided by this Court and further de-

cided it in such a way as to be probably in conflict with the applicable decisions of this Court.

The Circuit Court's decision is probably in conflict with these decisions: This Court said in *United States v. Wiltberger* (5 Wheat) 18 U. S. 76, 95-96, 5 Law Ed. 37, 42:

> "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment."
>
> * * * *
>
> "The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves do not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated."

This Court said in *Merritt v. Welsh,* 104 U. S. 694, 702-703, 26 Law Ed. 896-899

> "But in making its election, Congress did not leave any room for doubt as to its meaning. It used apt words to express it; terms free from all am-

> biguity and obscurity. If the test adopted fails to affect the desired object, the inconvenience or loss to the treasury need only be temporary; it can be changed at any moment. And it is better to submit to a temporary inconvenience than to set the laws all afloat by laying down a canon of construction which leaves the plain words and seeks to spell out or guess at the supposed intent of the Legislature, contrary or supplementary to that which is clearly embodied in the words it has used."

To the same effect are: *Hamilton v. Rathbone,* 175 U. S. 414, 419 and *Thompson v. United States,* 246 U. S. 547, 550.

In *Lansdown v. Faris* (C.C.A. 8) 66 Fed. (2d) 939 943, where the Circuit Court was urged to depart from the express words of the statute and construe the statute, relying upon material found in the debates of Congress, the Court pointed out that before it could look elsewhere for the legislative intent than to the statute itself, it must first find the statute ambiguous, pointing out that the rule applied "whatever may have been in the minds of individual members of Congress" (*Merritt v. Welsh,* 104 U. S. 694, 702) and then the Circuit Court epitomized the rules in the following language:

> "These rules of construction are not mere academic precepts. They go as deeply as the division of our form of government into three branches. It is the duty of the legislative branch to write the law. It is the duty of the judicial branch to take the law as so written. Whenever the judiciary changes that law—through construction or otherwise—it invades a domain prohibited to it and reserved solely for the legislative branch."

Hence, if the Circuit Court's decision is bottomed upon its construction of Section 3 of the Liquor Enforcement Act construed in connection with the Committee's Report, its decision is probably in conflict with the applicable decisions of this court.

4. THE CIRCUIT COURT'S INDEPENDENT INVESTIGATION OF THE DIFFERENCE BETWEEN THE TWO MEASUREMENTS, "3.2 PER CENT BY WEIGHT" AND "4 PER CENT BY VOLUME."

If the Circuit Court reached a conclusion from its independent investigation different from a conclusion that would be justified by considering the testimony of the three chemists, contained in the record, on the relationship of the two measurements, it would not be justified in affirming the Petitioner's conviction upon the results of its independent investigation. All the more would this be true where the Court has not set out specifically the information which its investigation revealed. The Circuit Court's opinion states, to be sure, that it found certain scientific treaties, which are named in the opinion, which were "to the effect that 4 per cent of alcohol by volume and 3.2 per cent of alcohol by weight are substantially identical" but neither the language used in said treaties nor the page numbers where the material may be found is set out. It is not likely, if there had been other evidence upon the subject than that given in the trial Court, that the Government would have failed to produce it.

Also, in fairness to the Circuit Court, it should be said that we do not construe its opinion as being bottomed upon its own investigation of the facts. However,

the opinion does indicate that the Court placed some reliance upon its independent investigation.

Insofar as its affirmance of the Petitioner's conviction was based upon its independent investigation, the Circuit Court departed from the accepted and usual course of judicial proceedings.

The only facts that can properly be before an appellate Court in a case in which it is exercising its appellate jurisdiction are those contained in the record and such facts as it may know judicially. *Edwards v. United States,* 61 Sup. Ct. Rep. 669.

If it is sought to sustain the Circuit Court's independent investigation of the facts on the grounds of judicial knowledge, then the decision is most certainly in conflict with applicable decisions of this Court.

If the Circuit Court's decision is bottomed upon its independent investigation of the facts, then it must be assumed that the investigation revealed facts different than those conclusions that could properly be drawn from the testimony of the three chemists who testified. Such a result could not be judicial knowledge under the decisions of this Court.

Thus, in *Brown v. Piper,* 91 U. S. 37, 42-43, 23 Law Ed. 200, 202 this Court said:

> "This power [of courts to take judicial knowledge] is to be exercised by the courts with caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt on the subject should be resolved promptly in the negative."

Further, while it might be possible that the correct facts might not have been elicited in the trial Court, the

fact that the same facts were developed in the case of United States v. Robason; United States v. Arnold and United States v. 1940 Model Dodge Coupe, all supra would indicate that the difference between the two measurements as established in the trial Court in this case was correct.

CONCLUSION.

The evidence set forth in the Petition shows that the only conclusion that may be drawn as to the relation between the two terms under consideration is that a measurement of 3.2 per cent of alcohol by weight will always permit an intoxicating liquor to contain more than 4 per cent of alcohol by volume. The difference ranges from .007 per cent in the case of alcohol and water alone to .9 per cent in the case of special concoctions. Beer will vary from .05 per cent to .2 per cent.

While it may be appropriate under some circumstances to refer to these two measurements as approximately the same, it cannot justly be done under the circumstances of this case. Thus, the Circuit Court has created a Federal offense by construction.

If the Circuit Court's decision is justified on the ground of its construction of the Act, then, in construing an unambiguous statute, it has run contrary to many decisions of this Court. Likewise, if the decision of the Circuit Court is explained as resulting from its independent investigation of the facts.

For these reasons then, it is respectfully suggested that the prayer of the Petition should be granted and that a writ of certiorari should issue herein.

Respectfully Submitted,

L. P. BROOKS,
A. V. ROBERTS,
Of Wichita, Kansas,
Counsel for Petitioner.

R. BOWLAND RITCHIE,
Of Wichita, Kansas,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 501

WALTER R. DOLLOFF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 65–70) is reported in 121 F. (2d) 157. The findings of fact and conclusions of law of the District Court, overruling petitioner's plea in bar, appear at R. 40–44.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 8, 1941 (R. 70–71). The petition for writ of certiorari was filed August 11, 1941. The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the Liquor Enforcement Act of 1936, prohibiting the importation of intoxicating liquor into any state wherein the sale of such liquor containing more than 4 percent of alcohol by volume is prohibited, applies to the State of Kansas, wherein the sale of intoxicating liquor containing more than 3.2 percent of alcohol by weight is prohibited.[1]

STATUTES INVOLVED

The Liquor Enforcement Act of 1936 (Act of June 25, 1936, c. 815, sec. 3, 49 Stat. 1928, 27 U. S. C. Supp. V, sec. 223), and the pertinent provisions of the laws of Kansas relating to the sale of intoxicating liquor are set forth in the Appendix A, *infra*, pp. 8–9.

STATEMENT

Petitioner was convicted (R. 17) and sentenced to 90 days' imprisonment (R. 17–18) by the United States District Court for the Western District of Missouri on an information (R. 1–2) charging an

[1] It is not denied that Kansas comes within the other conditions of the Liquor Enforcement Act of 1936 (see *infra*, p. 8).

attempt to transport intoxicating liquor out of the State of Missouri and into the State of Kansas, in violation of the Liquor Enforcement Act of 1936. Contending that the Act does not apply to the State of Kansas since the 3.2 percent of alcohol by weight prescribed in the Kansas statutes permits the sale of liquor containing more than 4 percent of alcohol by volume, petitioner interposed a plea in bar in which he moved to quash the information (R. 28–29). After hearing evidence (R. 30–39), the court overruled the plea (R. 44), making findings of fact and conclusions of law (R. 40–44). A demurrer to the information (R. 4–5) and a motion for judgment of acquittal (R. 15–16), based also upon the same ground, were likewise overruled (R. 16).

The Circuit Court of Appeals affirmed the conviction. After pointing out that in a prior case (*Arnold* v. *United States,* 115 F. (2d) 523) it had refused to hold the Liquor Enforcement Act of 1936 applicable to Kansas because there was no proof in the record concerning the relation between 3.2 percent of alcohol by weight and 4 percent by volume, the court held (R. 68) that there was in the instant record substantial testimony to support the trial court's finding (R. 43) that an alcoholic beverage containing 3.2 percent of alcohol by weight will contain approximately 4 percent of alcohol by volume. The appellate court also found that scientific authorities and standard encyclopedias corroborated this testimony (R. 69), and that the legislative history of the Liquor Enforcement

Act of 1936, as reflected in a congressional committee report indicated that Congress, in enacting the legislation, "considered that 4 percent by volume and 3.2 percent by weight were equivalents, if not identical" (R. 69).

There was testimony that whiskey, brandy, gin, beer, and wine are the alcoholic beverages commonly used in this country and that whiskey, gin, and brandy contain a much greater percentage of alcohol than either 4 percent by volume or 3.2 percent by weight (R. 31). There was evidence that ordinary beers contain between 4 and 6 percent solids (R. 38), and that "In a beer which contains 3.2% of alcohol by weight and 6.2 [%] of solids, the alcoholic percentage by volume is 4.1" (R. 37).[2] The reduction of the solid content results in a reduction of the alcoholic content by volume (R. 37–38).[3] While a witness for the petitioner testified that he prepared an experimental solution of alcohol, sugar, and water which contained 3.2 percent of alcohol by weight and approximately 4.9 percent of alcohol by volume (R. 30–31), there was testimony that no such beverage was known on the market and that no one would want to drink such a mixture (R. 34).

---

[2] One witness said that ordinary beers containing 3.2 percent of alcohol by weight would contain 4.1 or 4.2 percent of alcohol by volume (R. 33).

[3] None of the testimony related specifically to wines. However the district court in its findings treated wines containing 3.2 percent of alcohol by weight as falling within the same category as beers of that type (R. 42).

ARGUMENT

There can be no doubt that Kansas thought its legislation brought it within the protection of the Liquor Enforcement Act of 1936 (sec. 6, Kans. Laws, 1939, c. 179, *infra,* p. 9). And petitioner admits that Congress, as is evident from the congressional committee report,[4] considered, when it passed the Liquor Enforcement Act, that "a measurement of 4 percent of alcohol by volume was identical with a measurement of 3.2 percent of alcohol by weight" (Pet. 30). Also, the evidence clearly justified the findings below that the two percentages are approximately (R. 43) or substantially (R. 69) the same, a conclusion corroborated by scientific authorities and standard encyclopedias to which reference was made (R. 42, 69, 70).

But the petitioner contends that the congressional committee report cannot be utilized in ascertaining

[4] In H. Rept. No. 1258, 74th Cong., 1st Sess., p. 1, the Committee on the Judiciary, in stating the purpose and scope of the legislation, said: "The purpose of the bill is to enforce the twenty-first amendment * * * which guarantees Federal protection to 'dry' States against liquor-law violations directed from outside their borders. The bill extends this affirmative protection to States which forbid all sales for beverage purposes of intoxicating liquor containing more than 4 percent of alcohol by volume (*3.2 percent of alcohol by weight*). Your committee felt it was essential to protect States which permit the sale of liquor containing as much as 4 percent of alcohol by volume, in order to keep faith with the action taken by Congress in the so-called 'Cullen Beer Act' of March 22, 1933, which legalized light wines and beers *containing not more than 3.2 percent of alcohol by weight.*" [Italics supplied.]

the legislative intent in extending the protection of the Act only to those states which prohibit the sale of intoxicating liquor "containing more than 4 per centum of alcohol by volume," because these words are *per se* unambiguous and are not rendered ambiguous by anything else in the statute (Pet. 28, 31–40). But, as made clear by the record here, the application even of precise measurements is not free from ambiguity. And, as this Court said in *United States* v. *American Trucking Ass'ns.*, 310 U. S. 534, 543–544: "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use [citing *Boston Sand & Gravel Co.* v. *United States,* 278 U. S. 41, 48], however clear the words may appear on 'superficial examination.' "

The two circuits which are most concerned with the question here presented are the Eighth and the Tenth, Kansas being in the Tenth and both circuits comprising states adjacent to Kansas.[5] The con-

[5] The only two so-called "dry" States which have sought to avail themselves of the protection of the Liquor Enforcement Act of 1936 are Kansas and Oklahoma. Since its decision in the present case the Circuit Court of Appeals for the Eighth Circuit in *Flippin* v. *United States* (unreported, but printed in Appendix B, *infra*, p. 10) has held the Act to apply to Oklahoma. While the court felt that it might perhaps rest its determination upon the decision in the instant case, it referred to additional considerations peculiar to Oklahoma. In the *Flippin* case a petition for rehearing was denied on August 28, 1941, and the mandate has been stayed for 30 days to permit application to this Court for a writ of certiorari.

struction of the statute by the Circuit Court of Appeals for the Eighth Circuit in the present case has settled such confusion as may have existed because of diverse decisions by district judges in that circuit. In the Tenth Circuit no ruling upon the question has yet been made by the Circuit Court of Appeals. The only reported decision in that circuit is a district court decision and it held that the statute applies to Kansas. (See Pet. 24, 42.) We know of no contrary decisions in the district courts of the Tenth Circuit. Until the Circuit Court of Appeals for that circuit rules against the applicability of the statute to Kansas, there would seem to be no necessity for the granting of a writ of certiorari by this Court.

CONCLUSION

The construction of the Liquor Enforcement Act by the circuit court of appeals is in accord with the manifest congressional intent and there is involved no conflict of decisions. We therefore respectfully submit that the petition for writ of certiorari should be denied.

CHARLES FAHY,
Acting Solicitor General.
WENDELL BERGE,
Assistant Attorney General.
OSCAR A. PROVOST,
ANDREW F. OEHMANN,
W. MARVIN SMITH,
Attorneys.

SEPTEMBER 1941.

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APPENDIX A

The Act of June 25, 1936, c. 815, sec. 3, 49 Stat. 1928, 27 U. S. C. Supp. V., sec. 223, provides:

> (a) Whoever shall import, bring, or transport any intoxicating liquor into any State in which all sales (except for scientific, sacramental, medicinal, or mechanical purposes) of intoxicating liquor containing more than 4 per centum of alcohol by volume are prohibited, otherwise than in the course of continuous interstate transportation through such State, or attempt to do so, or assist in so doing, shall: (1) If such liquor is not accompanied by such permit or permits, license or licenses therefor as are now or hereafter required by the laws of such State; or (2) if all importation, bringing, or transportation of intoxicating liquor into such State is prohibited by the laws thereof; be guilty of a misdemeanor and shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> (b) In order to determine whether anyone importing, bringing, or transporting intoxicating liquor into any State, or anyone attempting so to do, or assisting in so doing, is acting in violation of the provisions of this chapter, the definition of intoxicating liquor contained in the laws of such State shall be applied, but only to the extent that sales of such intoxicating liquor (except for scientific, sacramental, medicinal, and mechanical purposes) are prohibited in such State.

The laws of the State of Kansas provide as follows:

G. S. Kans. (Corrick 1935) c. 21, art. 21, sec. 2101:

> It shall be unlawful for any person to directly or indirectly * * * sell * * * any spirituous, malt, vinous, fermented or other intoxicating liquors * * *.

G. S. Kans. (Corrick 1939 Supp.) c. 21, art. 21, sec. 2109:

> The term spirituous, malt, vinous, fermented or other intoxicating liquors as used in Sections 21–2101 to 21–2108, inclusive, of the General Statutes of 1935, and all amendments thereto, are hereby defined to include all beverages which contain more than three and two-tenths percent (3.2%) of alcohol by weight and all such beverages are hereby declared to be intoxicating liquors under the law of this state.

G. S. Kans. (Corrick 1939 Supp.) c. 21, art. 21, sec. 2109a:

> The words "intoxicating liquors" or "intoxicating liquor" wherever used in the General Statutes of 1935, and acts amendatory thereto, shall be construed to mean all such beverages referred to in Section 1 (21–2109) which contain more than three and two-tenths percent (3.2%) of alcohol by weight.

Kans. Laws, 1939, c. 179, sec. 6:

> This act [regulating importation and sale of intoxicating liquor] is intended to qualify Kansas for protection under the twenty-first amendment to the constitution of the United States.

APPENDIX B

United States Circuit Court of Appeals for the Eighth Circuit

July 16, 1941

WILLIAM (BILL) FLIPPIN, JACK BAUGH, AND TUDE PURKEY, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS

Before WOODROUGH, JOHNSEN, and VAN VALKENBURGH, *Circuit Judges.*

VAN VALKENBURGH, *Circuit Judge,* delivered the opinion of the court.

Appellants were convicted in the district court in and for the Western District of Arkansas, upon the charge of conspiring to commit the offense against the United States of unlawfully and knowingly importing, bringing and transporting certain intoxicating liquors from Benton County in the State of Arkansas to certain localities in the State of Oklahoma, in violation of the provisions of Section 3 of the Act of Congress known as the "Liquor Enforcement Act of 1936" (27 U. S. C. A. 223).

In this appeal the assignments of error present the following main points upon which appellants rely:

The Liquor Enforcement Act of 1936 was and is inapplicable to the transportation of liquor into the State of Oklahoma, and the demurrer of appellants to the indictment should have been sustained.

The evidence was insufficient, and the record was and is devoid of proof, as to the relative alcoholic content of a beverage containing 4% of alcohol by volume and a beverage containing 3.2% of alcohol by weight.

The gist of appellants' complaint is thus found in the contention that the Federal Liquor Enforcement Act of 1936 does not apply if the laws of the state into which the transportation is made do not require a permit to accompany the liquor imported, or if the laws of such state do not prohibit all importation of intoxicating liquor into such state; and that the laws of Oklahoma do not provide a permit system bringing the transportation of intoxicating liquor into that state under the terms and provisions of the Liquor Enforcement Act.

The basis of this contention is the provision in that Enforcement Act that in determining whether one is acting in violation of its provisions in importing, bringing or transporting any intoxicating liquor into any state in which such introduction is prohibited, subject to certain specific exceptions, "the definition of intoxicating liquor contained in the laws of such state shall be applied, but only to the extent that sales of such intoxicating liquor * * * are prohibited in such state." It is then pointed out that the Federal Enforcement Act prohibits the transportation into so-called "dry states" of intoxicating liquor "containing more than 4 per

centum of alcohol by volume," while the Oklahoma Statute, alleged to be responsive to the requirements of the Federal Enforcement Act, and effective April 20, 1933, defines intoxicating liquors as follows:

> Beverages containing more than three and two-tenths (3.2%) percent alcohol by weight are hereby declared to be intoxicating; all other beverages are declared to be non-intoxicating.

And it is further provided by statute (Sec. 2618 O. S. 1931) that:

> It shall be unlawful * * * to manufacture, sell, barter, give away or otherwise furnish any liquors * * * which contain more than three and two-tenths (3.2%) percent of alcohol, measured by weight.

Appellants then argue that, because the record is devoid of evidentiary proof that the alcoholic content of 4% by volume is substantially the same as alcohol content of 3.2% by weight, the control method adopted by the State of Oklahoma does not come within that outlined by the Federal Statute, and, therefore, that the latter is without application. Counsel for appellants find it necessary to call attention to the Oklahoma Liquor Permit Law of 1939 (Ch. 16, O. S. L. 1939, p. 16), as follows:

> Section 1. Importation without permit unlawful.
>
> It shall be unlawful for any person, individual or corporate, to import, bring, transport, or cause to be brought or transported into the State of Oklahoma, any intoxicating liquor, as defined by the laws of this State,

> containing more than four (4%) percent of alcohol by volume, without a permit first secured therefor as hereinafter provided.

But they urge its inapplication, because the Federal Enforcement Statute expressly provides that, in its enforcement, "the definition of intoxicating liquor contained in the laws of such state shall be applied, but only to the extent that sales of such intoxicating liquor * * * are prohibited in such state." We are thus consigned to a charge affecting a substantial historical policy of a sovereign state. Appellants rely strongly upon two decisions of this court holding that the control method adopted by the State of Kansas did not come within that outlined by the federal statute, and, therefore, we could not say that that statute applies to the State of Kansas. *Arnold* v. *United States* (C. C. A. 8) 115 F. (2d) 523; *Gregg* v. *United States* (C. C. A. 8) 116 F. (2d) 609. In the latter case (opinion per curiam) the court, on rehearing, reversed its former ruling in deference to the decision by another section of the court in the *Arnold* case. In Kansas, also, the statute expressly defining intoxicating liquor includes such liquor as contains more than 3.2 percent of alcohol by weight. In his opinion in the *Arnold* case Judge Gardner said:

> Whether the laws of Kansas prohibit all sales of intoxicating liquor containing more than 4 percent of alcohol by volume depends upon whether 3.2 percent by weight is the same or less than 4 percent by volume. This presents a problem of translating terms used in one statute into terms used in another statute. We are cited to no recognized standards, tables or formulae, by aid of which

> such translation of terms may be effected. We cannot presume that it is impossible to have an alcoholic beverage containing not more than 3.2 percent of alcohol by weight, which contains more than 4 percent of alcohol by volume, and hence, we cannot say that the Federal Act applies to the State of Kansas.

Since the filings of *Arnold* v. *United States*, and *Gregg* v. *United States, supra,* this court has reached the conclusion, based upon evidence before it, that an alcoholic beverage containing 3.2 percent of alcohol by weight will contain substantially 4 percent of alcohol by volume. It finds that recognized scientific authorities, and the legislative history of the enactment of the Liquor Enforcement Act, of which we may take judicial notice, are corroborative of that evidence, and, therefore, that the Liquor Enforcement Act is applicable to the State of Kansas. *Walter R. Dolloff* v. *United States of America,* decided July 8, 1941 — Fed. (2) —.

In this conclusion we fully concur and might perhaps rest the determination of the instant case upon it. But, for additional finality, we deem it pertinent to suggest that a pronounced difference exists between the basis underlying the public policies of the States of Kansas and Oklahoma in their attitude toward intoxicating liquors.

It is to be remembered that before the admission of Oklahoma as a state into the Union, a large part of its area was known as Indian Territory, in which were established by treaty and allotment a large number of Indian tribes, specifically designated as wards of the Government. Experience had proved that the use of intoxicating liquors was especially injurious and detrimental, not only to the Indians

themselves, but to others with whom they came in contact; and then existing laws imposed severe penalties upon the sale of intoxicants to Indians in general. The enforcement of these laws in Oklahoma was invested in the Federal Territorial courts. So exacting was the government in the maintenance of its duty and undertaking to protect its Indian wards in this respect that it made substantial observance of its territorial policy a condition of the admission of Oklahoma into the Union as a State.

Vol. 34 U. S. Stat. (Chapter 3335, p. 267, et seq.) contains, among other provisions, "An Act to enable the people of Oklahoma and of the Indian Territory to form a constitution and state government, and be admitted into the Union on an equal footing which the original states" (approved June 16, 1906); and Sec. 3 (2) of this Enabling Act contains the following provision:

> That the manufacture, sale, barter, giving away, or otherwise furnishing, except as hereinafter provided, of intoxicating liquors within those parts of said State now known as the Indian Territory, and the Osage Indian Reservation, and within any other parts of said state which existed as Indian Reservations on the first day of January, nineteen hundred and six, is prohibited for a period of twenty-one years from the date of the admission of said state into the Union, and thereafter until the people of said state shall otherwise provide by amendment of said constitution, and proper state legislation.

Section 7 of Oklahoma's proposed constitution, filed July 22, 1907, complied in exact language with this condition of the Enabling Act, and provided

exceptions for sales for medicinal and scientific purposes, etc. Even since the expiration of the twenty-one year period imposed by the Enabling Act and the legislative acceptance thereof, the State of Oklahoma has, in general, maintained its policy of prohibiting the importation and sale of liquors commonly regarded as intoxicating, and the United States has continued to hold this special interest in Oklahoma liquor legislation. Accordingly, as there appeared to be an increasing popular demand for modification of the National Prohibiton Act to permit the manufacture and sale of light beers, Congress enacted what is generally known as the Cullen Beer Bill, approved March 22, 1933, authorizing the manufacture and sale of malt liquor containing not more than 3.2% of alcohol by weight. However, this being a general statute applicable throughout the United States, Congress evidently thought it necessary to make special provisions for Oklahoma. It enacted House Bill 5690, approved June 16, 1933, expressly legalizing the manufacture, sale, or possession of 3.2 per centum beer in the State of Oklahoma (48 Stat. 311). This was not repealed by the Act of August 27, 1935, described as an Act "to repeal Titles I and II of the National Prohibition Act, to reenact certain provisions of Title II thereof, to amend and repeal various liquor laws, and for other purposes," to be cited as the "Liquor Law Repeal and Enforcement Act" (49 Stat. 872).

Thus we come to the Act of June 25, 1936 (49 Stat. 1928), to enforce the twenty-first Amendment to the Constitution, in which the importation into dry states of intoxicating liquor "containing more than 4 per centum of alcohol by volume (except for

scientific, sacramental, medicinal, or mechanical purposes) is prohibited, and in which the definition of intoxicating liquor is made to depend upon state legislation as hereinabove shown."

An important consideration in the construction of statutes is the ascertainment of the purpose and intent of the legislation, where this is possible without distortion of the fair meaning of the language used. *United States* v. *Raynor,* 302 U. S. 540. It will be noted that a close relationship exists between the Acts of Congress and of the Oklahoma legislature with respect to intoxicating liquors.

The first departures from the rigidity of the provisions of National Prohibition concerned the manufacture and sale of light beer, and it is evident that in all federal statutes involved Congress intended that the terms used should be understood in their every day and popular definitions. In this, as in all cases, recourse to Committee reports, sheds informative light, not only upon the intent of Congress, but also upon the comprehensive meaning of the words used. In the report of the Committee of Ways and Means upon the Cullen Beer Bill, approved March 22, 1933 (48 Stat. 16), its chairman said:

> Whether the repeal of this eighteen amendment is to be ratified is yet to be determined and will, of course, require the favorable action of conventions of three-fourths of the States. Pending the determination of this question, the Congress has the power to make such changes in the national prohibition act as it may see fit, keeping in mind the letter and spirit of the amendment. In other words, it may permit the manufacture and sale of any alcoholic

> liquor which may reasonably be said to be nonintoxicating in fact.

Further on the report says:

> The bill provides for a manufacturers' excise tax of $5 per barrel on all beer, lager beer, ale, porter, or other similar fermented liquor, containing * * * not more than 3.2 percent of alcohol by weight, which is equivalent to 4 percent by volume.

And, again:

> To make legal the sale of such fermented liquor, the bill provides that the national prohibition act, as amended and supplemented, shall not apply to beer, ale, porter, or similar fermented liquor containing 3.2 percent or less of alcohol by weight, or 4 percent alcohol by volume.

Mr. Celler, from the Committee on the Judiciary, submitted report on H. B. 8368, to Enforce the Twenty-first Amendment to the Constitution, approved June 25, 1936 (49 Stat. 1928). He said:

> The purpose of the bill is to enforce the twenty-first amendment to the Constitution of the United States, which was declared to be effective on December 5, 1933, and which guarantees Federal protection to "dry" States against liquor-law violations directed from outside their borders. The bill extends this affirmative protection to States which forbid all sales for beverage purposes of intoxicating liquor containing more than 4 percent of alcohol by volume (3.2 percent of alcohol by weight). Your committee felt it was essential to protect States which permit the sale of liquor containing as much as 4 percent of alcohol by volume, in order to keep faith with the action taken by Congress in

> the so-called "Cullen Beer Act" of March 22, 1933, which legalized light wines and beers containing not more than 3.2 percent of alcohol by weight. Those States are considered "dry" under the bill which permit the sale of liquor containing only so much alcohol as Congress in the act of March 22, 1933, declared not to be within the prohibition of the eighteenth amendment and the National Prohibition Act as to "intoxicating liquors."

The report added:

> The liquor traffic will be controlled by the Federal Government only to the extent that the States may desire; and that is in keeping with the *obvious intent* of the Twenty-first Amendment. [Italics supplied.]

June 24, 1938, the Circuit Court of Appeals for the Tenth Circuit, within whose geographical limits Oklahoma lies (*Dunn* v. *United States,* 98 F. (2d) 119), held that the Liquor Enforcement Act making importation or transportation of liquor into a dry state a federal offense, was inapplicable to Oklahoma because it did not then by its laws prohibit all such importation, or require a permit or license to accompany liquor lawfully imported. Whether responsive to this decision or otherwise, the legislature of Oklahoma enacted the liquor permit law of March 2, 1939 (Ch. 16 O. S. L. 1939, p. 16), generally called the Conformity Statute hereinabove quoted; and, since then, the application of the Enforcement Act has been recognized by the same Court of Appeals in two cases. *Hayes* v. *United States,* 112 F. (2d) 417; and *Hinkle* v. *United States,* 115 F. (2d) 217; in neither of which this question of the per centum of alcoholic content was even suggested.

Taking into account the consistent historical policy of both Congress and the State of Oklahoma with respect to intoxicating liquors, and the obvious intent and purpose of the twenty-first amendment, disclosed by Congressional report, and of the State Legislation in conformity therewith, is it not conclusively established that 4 per centum of alcohol by volume and 3.2 percent of alcohol by weight are substantially identical, and that the state has sufficiently declared and prescribed the extent to which it desires its liquor traffic to be controlled by the federal government?

In addition to three well-known sources of information aiding construction of statutes, we have been referred to recognized scientific authorities, including Remington's Practice of Pharmacy, Department of Commerce, Bureau of Standards, Rogers' Manual of Industrial Chemistry, and Standard Encyclopedias, in all of which 4 percent by volume and 3.2 percent of alcoholic content by weight are recognized as substantially identical. The concurrence of such established expert authorities, while not deemed essential to the determination of this controversy, is corroborative of the legislative judgment employed in the enactment of these statutes; and its indulgence does not deprive counsel for appellants of any practical opportunity for cross-examination which is suggested. *Work* v. *Parker,* 249 U. S. 130, 132; *Northwestern National Life Ins. Co.* v. *Banning* (C. C. A. 8), 63 F. (2d) 736. Moreover, in the record proper, we find extended exhibits of the liquors imported and transported from Arkansas into Oklahoma as charged, the main items of which are generally known brands of whiskey, and are so described by the witnesses.

It is a matter of common knowledge that commercial whiskey has an alcoholic content far in excess of any allowable per centum under this statute, whether by weight or volume. According to the Standard Dictionary, to which we may perhaps be permitted to refer, "it contains when prepared for consumption as permitted by the regulations of the Bureau of Internal Revenue, not less than forty-five (45) percent by volume of ethyl alcohol, and, if no statement is made concerning its alcoholic strength, it contains not less than fifty (50) percent of ethyl alcohol by volume as prescribed by law."

By assignments not stressed in argument counsel for appellants have added exceptions to the trial court's refusal to give certain requested instructions, and to its action in permitting the interrogation of a government witness as to his testimony before the grand jury. These assignments have received careful consideration; and we find that, while there was some informality in the main charge, the law of the case was finally so carefully submitted as to preclude any misunderstanding on the part of the jury; and that the questions complained of, permitted to refresh the memory of the witness, furnish no ground of support for the claim of mistrial. We hold that the Liquor Enforcement Act is properly applicable to the State of Oklahoma, and for all the reasons stated we conclude that the judgment of conviction should be affirmed, and it is so ordered.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1941

WALTER R. DOLLOFF, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

Comes now the Petitioner, Walter R. Dolloff, and prays for a rehearing of his petition for a writ of certiorari heretofore filed before the Court which petition prayed that a writ of certiorari issue to review the judgment entered on the 8th day of July, 1941 in the United States Circuit Court of Appeals, Eighth Circuit in the above entitled cause and for his petition for rehearing of his said petition, states to this Honorable Court:

In presenting this matter to the Court in his petition for a writ of certiorari, the Petitioner dwelt upon two propositions:

1. That the evidence before the trial court warranted no other conclusion but that a measurement of 3.2 per cent of alcohol by weight (the quantity permitted in beverages by the laws of the State of Kansas) would always permit an intoxicating liquor to contain more than 4 per cent of alcohol by volume. (P. 6-18).

2. That Section 3 of the Liquor Enforcement Act of 1936 provided unambiguously that the Act did not protect any state from liquor violations from outside its borders unless that state prohibited all sales for beverage purposes of intoxicating liquor containing more than 4 per cent of alcohol by volume. (P. 31-40).

Relying upon the rule, many times announced by this Court, that material outside an unambiguous statute could not be used to create an ambiguity and that when the statute was plain there was nothing to construe (*United States v. Wiltberger* (5 Wheat.) 18 U. S. 76, 95-96; *Merritt v. Welsh,* 104 U. S. 694, 702-703; *Hamilton v. Rathbone,* 175 U. S. 414, 419), Petitioner treated the part of the report set out in the Circuit Court's opinion (R. 69, Para. 3; B. in Opp. 54) in its most favorable aspect from the viewpoint of the Government, i. e., in the manner in which matters are treated upon a demurrer. Petitioner, in view of the decisions of this Court mentioned above, admitted that the parenthetical insertion in the report placing the phrase *3.2 per cent of alcohol by weight* in apposition with the phrase *4 per cent of alcohol by volume,* furnished grounds for the inference that the "Committee believed * * * that a measurement of 4 per cent of alcohol by volume was identical with a measurement of 3.2 per cent of alcohol by weight". (P. 30, para. 4)

The position taken by the Government in its brief in opposition was that even though the evidence supported the conclusion asserted by the Petitioner and even though the statute was unambiguous, the Court could consult other data in determining the meaning of Section 3 of the Act. The Government cited *United States v. American Trucking Ass'ns.*, 310 U. S. 534, 543-544, which cited *Boston Sand & Gravel Co. v. United States,* 278 U. S. 41, 48.

In Boston Sand & Gravel Co. v. United States, supra, it was said:

> "It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience than a rule of law and does not preclude consideration of *persuasive* evidence if it exists. If Congress has been accustomed to use a certain phrase with a more limited meaning than might be attributed to it by common practice, it would be arbitrary to refuse to consider that fact when we come to interpret a statute." [Italics supplied.]

In view of the language of this decision, the question here is whether the Committee's report furnishes *persuasive* evidence that when Congress used the term 4 per cent by volume in the statute, it used it as synonymous with the term 3.2 per cent by weight, or what amounts to the same thing, whether Congress was laboring under the impression that the two terms provided for identical measurements.

To begin, the two terms are not the same. (R. 30-39). Placing the terms in apposition in the report suggests that the author of the report, the Committee, considered that the two terms provided for identical measure-

ments. However, the language of the report, compared with that of the statute, is informal. The report is written in the language of the layman. Informally speaking, one might refer to the two terms appositionally—they are approximately the same. But we are not to interpret a statute so as to imply thereby that Congress was ignorant of the meaning of the language it used unless in no other way can we come at the true legislative intent. (*Inhabitants of the Township of Montclair v. Ramsdell,* 107 U. S. 147.)

If the opinion of the Circuit Court herein stands, the statute has been interpreted so as to imply that Congress was ignorant of the meaning of the language which it used.

Congress had the two terms before it when it was enacting the law. This is clear from the report. There was some reason why it changed from the term "3.2 per cent by weight" of the Cullen Beer Bill to the term "4 per cent by volume" of the Liquor Enforcement Act of 1936. A measurement by volume is constant. Regardless of the ingredients in a beverage, 4 per cent by volume is always 4 parts out of every 100 parts of volume. Percentage by weight is variable. 3.2 per cent by weight varies with the ingredients in the beverage. This is the reasonable explanation for the change.

The appositional reference in the report is due, no doubt, to the feeling by the Committee of a need to explain why it was classifying states which permitted the sale of low content alcoholic beverages as "dry" states. Congress had classified alcoholic beverages containing not more than 3.2 per cent of alcohol by weight as not within the ban of the 18th Amendment by the Cullen Beer Act of 1933. It would have been a breach of faith

for Congress to have denied the protection of the Liquor Enforcement Act to states which permitted the sale of low content alcoholic beverages on the grounds that they were not dry states in view of its own Cullen Beer Bill. The two terms were approximately the same. Thus, if Congress for reasons of greater certainty, chose to adopt the volume measurement term, the states affected thereby would have no serious ground for complaint.

Therefore, Congress chose to and did adopt the 4 per cent by volume measurement advisedly and for reasons satisfactory to itself and not under any misapprehension as to the meaning of the terms. One other fact supports the conclusion that Congress wrote the Liquor Enforcement Act without any misapprehension as to the meaning of the terms. At the time the Act was enacted, there was not one state of the 48 which, without changing its laws, could qualify for protection under the Act. (*Dunn v. United States,* 98 Fed. 2d. 119). The Act made two conditions for those states which desired its protection:

1. They must prohibit all sales of alcoholic beverages containing more than 4 per cent of alcohol by volume.
2. If they permitted liquor to come into the state, they were required to establish a licensing system for such liquor.

Since any state desiring to take advantage of the Act would be required to amend its laws and since Congress apparently preferred the volume measurement and since 4 per cent by volume and 3.2 per cent by weight were nearly the same, it would appear that the true intent of the Congress as evidenced by the Liquor Enforcement

Act of 1936, was to protect only those states which co-operated to the extent of comporting to the two conditions, and that Congress was not befuddled as to the meaning of the terms when it enacted the law.

Hence, the appositional expression in the Committee's report is not *persuasive* evidence that Congress was using the term "4 per cent of alcohol by volume" with a limited meaning, nor that Congress was ignorant of the difference between the two terms.

Kansas has failed to comply with the first condition precedent and that being the only question in the case, it is respectfully submitted that the Court should grant the Petitioner a rehearing and grant the writ prayed for in the petition for certiorari.

Respectfully submitted,

L. P. BROOKS,
A. V. ROBERTS,
Of Wichita, Kansas,
Counsel for Petitioner.

R. BOWLAND RITCHIE,
Of Wichita, Kansas,
Of Counsel.

CERTIFICATE OF COUNSEL.

The undersigned, L. P. Brooks and A. V. Roberts, counsel for the petitioner, Walter R. Dolloff, hereby certify that the foregoing petition for rehearing of petitioner's petition for a writ of certiorari is filed in good faith; that they believe same to be meritorius; and that said petition for rehearing is not filed for the purpose of delay.

L. P. BROOKS,
A. V. ROBERTS,
Of Wichita, Kansas,
Counsel for the Petitioner.